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Supreme Court, U.S.
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NO. 88-5347

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

KEITH PATILLO,

Petitioner,

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SUPREME COURT, U.S.

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR
A WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED

I.

Whether this Court should decline to grant a writ of certiorari to examine the Supreme Court of Georgia's determination that the nondisclosure of a non-promissory agreement between the state and a witness was harmless?

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BRIEF IN OPPOSITION FOR RESPONDENT

PART I

STATEMENT OF THE CASE

The Petitioner, Keith Patillo, was indicted for murder in Bibb County during the August Term, 1986. (R. 2-2A). Petitioner was charged with killing Stephanie Leigh McLamb by beating her several times in the head with a baseball bat. After a trial by jury which was conducted in February, 1987, Petitioner ws found guilty of malice murder. After a separate proceeding to determine punishment, the jury found the existence of a statutory aggravating circumstance and Petitioner was sentenced to death. (R. 138-141). After a denial of Petitioner's motion for a new trial and extraordinary motion for new trial, the Supreme Court of Georgia affirmed Petitioner's conviction and sentence in May, 1988. Patillo v. State, 258 Ga. 255, 368 S.E.2d 493 (1988). Thereafter,

Petitioner filed the instant petition for a writ of certiorari in this Court. The facts of the case, as established by the evidence presented at trial and as succintly reiterated on direct appeal by the Supreme Court of Georgia are as follows:

> The victim, 19 year old Stephanie McLamb, met [Petitioner] one Sunday afternoon at Central City Park in Macon. [Petitioner] called her a few days later, and [Petitioner] and the victim and her friend Lisa [Wilkes] met and spent several hours together, driving around in the [Petitioner's] car. [Petitioner] stated that he had to meet his brother at 11:00, and he dropped Lisa off at her home.
>
> Around midnight, [Petitioner] called his roommate, saying he needed a ride home; his car was stuck. The roommate picked [Petitioner] up at Central City Park. [Petitioner] had blood on his legs and carried a blood stained baseball bat. [Petitioner] explained that he had been attacked by two men. However, [Petitioner] did not want to call the police or to get his car that night. When [Petitioner] got home, he rinsed off the bat and took a bath.
>
> The next morning, Charles Hamlin went to his okra field in the lower Poplar Street area of Macon, not far from the city's water and sewage treatment facility. The car was stuck in the muddy lane that partly circled the field and [Petitioner] was trying to get it out. Hamlin used his truck to pull the [Petitioner's] car free. Then he noticed some clothing near a pile of brush . . . beside the ditch on the edge of the field some eighty feet from where the [Petitioner's] car had been. Hamlin went to look, and, under the pile of brush, observed a nearly-nude female body. [Petitioner] denied knowing anything about the body, and gave Hamlin a false name, then he left, and Hamlin called the police.

Patillo v. State, at 855-856. A subsequent investigation of the case revealed that the victim had been struck at least ten times about the head. (T. 294). Patillo v. State, at 256. "She was struck on her forehead, her left eye, her mouth, her right ear, and all over the back of her head. Her skull was fractured, and her scalp was separated from her skull. Death occurred somewhere between five and thirty minutes after the attack." Patillo v. State, at 262-263. The victim also suffered a number of defensive wounds as she attempted to ward off the blows to her head with her hands and her arms. (T. 294-295).

A search warrant executed at Petitioner's residence uncovered bloody clothes and the baseball bat which served as the murder weapon. (T. 114). The victim's blood was determined to be on the Petitioner's clothing, and on the baseball bat. (T. 211).

In a number of communications after the incident, Petitioner claimed that he engaged in consenual sex with the

victim after which his car got stuck in the mud. Allegedly, the victim threatened to call the police and claim that the Petitioner raped her because the Petitioner could not get her back home at a predesignated time. (T. 156-157). After informing one friend of his version of the facts, Petitioner stated, "She really had me pissed. So I decided that she was not going nowhere and then I killed her." (T. 272). Additionally, in the same communication, Petitioner threatened a man named "Steve". Petitioner wrote, "Tell [Steve] he had better watch his ass close because he just might have Louisville Slugger printed on his head next." (T. 273). The letter was signed "Keith, The Soko" and next to "Soko" was a drawing of a baseball bat. (T. 273).

After considering all of the evidence presented by the state, the jury, as stated earlier, sentenced the Petitioner to death. Further facts will be developed as is necessary for a more thorough illumination of the issue presented to this Court.

PART II

REASONS FOR NOT GRANTING THE WRIT

A. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT THE UNDISCLOSED NON-PROMISSORY AGREEMENT WITH A STATE WITNESS WAS HARMLESS TO THE PETITIONER.

Petitioner contends that the Supreme Court of Georgia did not apply the appropriate standard in determining that the undisclosed, non-promissory agreement with a state witness was harmless. Petitioner does not challenge the conviction itself, but rather the sentence imposed based upon his belief that the Supreme Court of Georgia did not consider harmless error in light of the jury's discretion, and Petitioner's contention that the court applied the wrong legal standard. Respondent avers that the Supreme Court of Georgia's decision is correct, and in accord with the decisions of this Court.

Before trial, Petitioner's counsel filed a "Motion to Reveal the Deal." (R. 25). In the motion, Petitioner's counsel requested that the district attorney's office inform the defense of any agreement with any prosecution witness. After a hearing, the trial court granted the Petitioner's motion. (R. 91).

As the district attorney's office had entered into no "promissory" agreements, and as no offer of leniencey was made to any state witness, the district attorney's office did not respond to Petitioner's motion to reveal the deal. Petitioner was then tried for murder and convicted of the offense on February 6, 1987. (T. 138).

In the sentencing portion of Petitioner's trial, the state called David Chatman, a convicted felon who was housed in the

same cellblock as Petitioner pending Petitioner's trial. Chatman stated that the state had made no deal with him in exchange for his testimony. (T. 442, 448-449). It was brought to the attention of the jury that Chatman had been convicted of theft by deception, and forgery, crimes which both involved deceiving people, and that Chatam had been convicted of driving under the influence. (T. 445, 448).

In summary, during the sentencing portion of trial, Chatman testified that during conversations with Petitioner, Petitioner admitted killing the victim. In addition to this cumulative testimony, and other cumulative testimony provided by Chatman, Chatman testified that Petitioner revealed to him that Petitioner hated women because of treatment Petitioner received from his stepmother. (T. 441-445). On direct appeal, the Supreme Court found that Chatman testified that Petitioner had told him that:

> He hated women . . . when he was small his stepmother turned his daddy against him . . . they adopted a little girl . . . and wouldn't let him stay with them anymore. . . Chatman described an incident in which the stepmother had tried to embarass the [Petitioner], and testified that [Petitioner] had explained his feelings on the night of the murder thusly: [Petitioner] said that he just had nothing in him but hatred from constant hostility that he had had I reckon since he was young, things, you know that he was going through with his stepmother. He said at that particular time, that particular night, he said that if anybody would have walked up on him, he probably would have killed them too . . . [Petitioner] said his stepmother was lucky that he hadn't done something to her because he hated her.

Patillo v. State, at 858-859.

The jury considered the state's evidence in aggravation which included Chatman's testimony as well as all the evidence presented during the guilt-innocence phase of trial, and the jury considered the evidence presented in mitigation by Petitioner which included testimony from former foster parents, a psychologist, and friends. The Georgia Supreme Court determined that the evidence proffered by Petitioner in mitigation of sentence revealed that Petitioner's original home life was violent.

> His parents fought a lot, and he was placed in permanent foster care when he was six years old. His mother visited him only one time, "promised a bunch of stuff," and never returned. When he was fourteen or fifteen, he went to live with his father and stepmother. However, his stepmother disliked him and his father physically abused him, and he was soon removed from the home and returned to foster care.

Patillo v. State, at 259. Further, the Georgia Supreme Court noted that according to Petitioner's own witness, a psychologist, the Petitioner was angry, hostile, and anxious. Patillo v. State, at 259.

After considering evidence in aggravation and mitigation, the jury found the existence of a statutory aggravating circumstance and Petitioner was sentenced to death. After a motion for new trial had been denied, state witness Chatman wrote letters to the district attorney's office claiming that the state had reneiged on an agreement made with Chatman. Chatman threatened to inform Petitioner's counsel of the alleged agreement if the state did not have Chatman's probation reinstated. (Hearing on extraordinary motion for new trial conducted August 11, 1987, hereinafter E.M.N.T. p. 127-131, 136-138, 141-146, 148-155).

In response to the letters from Chatman, the district attorney's office informed, and reminded Chatman that no deals had been made as it was not the district attorney's policy to make deals with witnesses. Copies of correspondence from Chatman to the district attorney were forwarded to Petitioner's trial counsel. The pending appeal, Patillo v. State, Case No. 44654 (Ga. remanded June 17, 1987), was remanded to the trial court for a hearing on Petitioner's extraordinary motion for a new trial.

Prior to the hearing, Chatman again corresponded with the district attorney's office. Chatman apologized for the former letters and explained that the letters were written because he was afraid for his life because of his presence in the state institution at Jackson, Georgia. (E.M.N.T. p. 156-158). Chatman recanted his initial letters voluntarily; the state did nothing to encourage or discourage Chatman from recanting or maintaining his position. (E.M.N.T. 75-76).

A hearing was conducted in the trial court on August 11, 1987, to determine if the state had not disclosed an agreement with a state witness. David Chatman testified at the hearing as well as Assistant District Attorneys Robin Odum and Virgil Adams. Chatman testified that he made the initial contact with the district attorney's office about statements made by

Petitioner. (E.M.N.T. p. 30-32). Chatman asked that his probation, which had been revoked a few months prior to Petitioner's trial, be reinstated. (E.M.N.T. p. 29, 33, 103). Chatman was told that no agreements could be made and that even if an agreement could be made the district attorney's office had no power to influence the judge's decision to revoke probation. (E.M.N.T. p. 34, 98, 117). Although Chatman attempted to receive help in having his probation restored, he told the assistant district attorneys that his real reason for wanting to testify was that Petitioner had committed a vile crime and then bragged about it while incarcerated. (E.M.N.T. p. 58).

After the first meeting, subsequent meetings between the assistant district attorney and Chatman were arranged, however, Chatman provided no additional information. (E.M.N.T. p. 65-99, 122). In the interim, between interviews, Chatman was instructed not to ask the Petitioner anything. (E.M.N.T. p. 44, 60, 85, 102, 120).

Assistant District Attorneys Odum and Adams testified at the August hearing to the fact that no offers of leniency or promissory agreements were made with Chatman. (E.M.N.T. p. 92, 114). The office policy of the district attorney in the Macon Judicial Circuit prevents the making of agreements with witnesses. (E.M.N.T. p. 93, 114). In their first meeting with Chatman, Chatman was told that no deals would be made for his testimony and that the district attorney's office had no authority to have his revoked probation reinstated.

Although no promissory agreement, or promises of leniency were made to Chatman, the assistant district attorneys did state the following to Chatman:

> What we did tell [Chatman] was that we would go to the judge that had revoked [Chatman's] his probation and tell him

> of your testimony in the Patillo case
> and leave the decision as to whether or
> not to restate [sic] your probation
> status to him.

(E.M.N.T. p. 104-105, 139). No promise was ever made to Chatman that the district attorney's office would offer leniency, or make a recommendation that the judge who revoked Chatman's probation reinstate the probation. The trial court responsible for revoking Chatman's probation did not reinstate the probation but rather approved of a letter from the district attorney's office to the Department of Corrections requesting that Chatman be placed in a secure facility so that he would not have his life threatened because he had testified for the State at trial. (E.M.N.T. 105, 133-135).

When Chatman was transferred to the state institution in Jackson, Georgia, to be processed into the prison system, he was afraid for his life and wanted the district attorney's office to arrange for him to either leave Jackson on probation or be transferred to a different institution. Accordingly, Chatman concocted stories and wrote letters to the district attorneys' office. (E.M.N.T. p. 68). Chatman stated that the statements in the first letters to the district attorneys office claiming that there was an agreement between Chatman and the state were false. (E.M.N.T. p. 69, 70, 82, 83). Chatman further testified that the district attorney's office did nothing to influence his decision to recant the statements in the first letter. (E.M.N.T. 76).

After considering the evidence presented at the hearing on the extraordinary motion for new trial, the trial court determined that the death penalty was imposed because of the brutal nature of the murder committed. Further, the court specifically found that Chatman's testimony added nothing to the state's case. Patillo v. State, at 262. On direct appeal,

the Supreme Court of Georgia adopted the trial court's factual and credibility determinations which were made after the hearing on the extrordinary motion for new trial. The Supreme Court also adopted the trial court's conclusion that Chatman's testimony added nothing to the state's case. Patillo v. State, at 261-262.

Pursuant to Brady v. Maryland, 373 U.S. 83 (1963), a state must disclose favorable evidence to the defense. Brady only requires disclosure of evidence that is both favorable to the accused and material either to guilt or punishment. United States v. Bagley, 473 U.S. 667, 675 (1985). Disclosure is required regardless of whether the evidence is "exculpatory" or may be used for impeachment. In United States v. Bagley, the court rejected any distinction between impeachment evidence and exculpatory evidence. Bagley v. State, at 677.

In United States v. Bagley, in addition to rejecting the distinction between impeachment evidence and exculpatory evidence, this Court determined tht evidence is material and thus must be disclosed only if, "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a proability sufficient to undermine confidence in the outcome." United States v. Bagley, at 683.

A review of the court's decision in United States v. Bagley reveals that the court determined that agreements which were expressed in signed contracts were not revealed to the defense. The court remanded the case for a determination of whether there was a reasonable possibility that had the agreements been disclosed to the defense, the result of the trial would have been different. More recently, following the ruling set forth in Bagley, the Eleventh Circuit Court of Appeals determined that a conviction had to be reversed based upon an undisclosed agreement because a witness with whom the

state made the agreement gave crucial testimony. Brown v. Wainwright, 785 F.2d 1457, 1466 (11th Cir. 1986). In Brown v. Wainwright, the Eleventh Circuit considered Giglio v. United States, 405 U.S. 150 (1972), Napue v. Illinois, 360 U.S. 264 (1959), and Bagley, before determining that the state's case turned on the witnesses testimony for whom the state did not disclose an agreement. The Court held that absent the witnesses' testimony, the state might not have had a sufficient case to submit to the jury. Brown v. Wainwright, at 1466.

Most recently, in Satterwhite v. Texas, ___ U.S. ___, 108 S.Ct. 1792 (1988), the Court found that the harmless analysis of Chapman v. California, 386 U.S. 18 (1967), could be applied to the sentencing portion of a capital proceeding. The Court recognized that a harmless error analysis in the sentencing portion of a capital proceeding would, as in all cases of an application of the harmless error rule "promote public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtual inevitable presence of immaterial error." Satterwhite v. Texas, at 1797.

In Satterwhite v. Texas, the Court construed the narrow issue of whether it was harmless error to introduce psychiatric testimony during the sentencing portion of a capital case in the State of Texas. Admission of the psychiatric testimony would be crucial in a Texas sentencing procedure in that in order for a death penalty to be imposed, a jury in Texas must make a specific finding regarding the defendant's future dangerousness. Satterwhite v. Texas, at 1795. See also Estelle v. Smith, 451 U.S. 454 (1981). In reversing the conviction, the Court specifically determined that a finding of future dangerousness was critical to imposition of the death sentence against the defendant. Satterwhite v. Texas, at 1799. Thus, because improperly admitted evidence is critical, it can not be said that the evidence was harmless beyond a reasonable doubt.

Although the Court reversed the conviction in Satterwhite v. Texas, in laying down the rule that a harmless error analysis may apply to capital sentencing procedures, the Court stated, "We beleive that a reviewing court can make an intelligent judgment about whether an erroneous admission of [evidence] might have affected a capital sentencing jury." Satterwhite v. Texas, at 1798 (emphasis added).

1.

Before determining whether there is an undisclosed agreement between the state and a witness, a reviewing court must determine whether there in fact existed an agreement. In Giglio v. United States, a prosecutor promised the witness that no charges would be brought against him if he testified against the defendant. In Napue v. Illinois, the prosecutor promised a witness that the state would recommend that the sentence the witness was serving would be reduced in exchange for the witness' testimony. In Brown v. Wainwright, the state agreed not to prosecute the witness if the witness testified. In all of the above cases, it is evident that the state agreed to either be lenient, or recommend leniency in return for testimony. The state's offer of leniency was the quid pro quo for the witness' testimony.

In contrast to the above cases in which the state offered leniency, in McCleskey v. Kemp, 753 F.2d 877, 884 (11th Cir. 1985) (en banc), a detective promised to speak a word for the witness. The court found that the offer was of such marginal benefit that it was doubtful that it would motivate a reluctant witness or that the disclosure would have any effect upon the witness' credibility.

In the instant case, the trial court, and the Supreme Court of Georgia determined that an agreement existed and that the state should have revealed the agreement no matter how

nonpromising the nature of the agreement. Patillo v. State, at 260-261. While Respondent is bound by findings and decision of the state court, Respondent notes that neither assistant district attorney who dealt with Chatman stated that they would have his probation reinstated or even recommend to the court that his probation be reinstated. Rather than offer any leniency, what the assistant district attorneys did, in essence, was state to Chatman that they would make matters of public record, i.e., Chatman's record and Chatman's participation in Petitioner's trial, known to the judge who revoked Chatman's probation. It was made clear to Chatman that it would be up to the judge at that point to make a decision without any recommendation from the district attorney.

2.

In the instant case, the state court determined that an agreement was made with state witness Chatman. Respondent submits that the agreement was nonpromissory in that Chatman was not told that probation would be reinstated, pending charges would be nolle prossed, or that a lighter sentence would be sought for the witness. Additionally, Respondent submits that the nonpromissory agreement offered such a marginal benefit to Chatman that it is doubtful that the offer would motivate a reluctant witness. See McCleskey v. Kemp,.

After it has been determined that an agreement has been made, albeit a nonpromissory marginal agreement, this Court has determined that a harmless error analysis may be applied. In United States v. Bagley, the Court phrased the harmless error rule in terms of materiality, i.e., in order for a nondisclosed agreement to deny a defendant a fair trial it must be established that the evidence in question is material. The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the

results of the proceeding would have been different. United States v. Bagley, at 683. See also Strickland v. Washington, 466 U.S. 668 (1984).

In Satterwhite v. Texas, the Court spoke of the harmless error analysis in terms of the state establishing, beyond a reasonable doubt, that the constitutional error did not contribute to the verdict.

Respondent submits that the Court's decisions are not inconsistent in that both require a showing that the challenged evidence is harmless. Further, Respondent notes that a reviewing court can make the determination of whether a constitutional error is harmless in that it "might have affected a capital sentencing jury." Satterwhite v. Texas, at 1798.

In the instant case, Respondent submits that had the nonpromissory marginal agreement between the state and David Chatman been disclosed to the defense the result in the sentencing phase of trial would not have been different, and the admission of Chatman's testimony was harmless beyond a reasonable doubt. First, Respondent submits that the results would not have been different in that the aggravating circumstances found by the jury to support Petitioner's sentence was that the offense of murder was committed while Petitioner was engaged in the commission of an aggravated battery and that the offense of murder was outrageously and wantonly vile, horrible, and inhuman, in that it involved depravity of mind and aggravated battery to the victim. (R. 139). Respondent submits that the testimony given by Chatman in the sentencing phase of trial did not bear upon the aggravating circumstance found by the jury or to the extent that his testimony did marginally bear upon an aggravating circumstance, it was cumulative to testimony presented during the guilt-innocence phase of trial.

Secondly, Respondent submits that unlike the situation in Brown v. Wainwright, it can not be said that the state's case turned upon Chatman's testimony. Similarly, the instant case is unlike the situation presented in Satterwhite v. Texas. As stated earlier, the improper evidence in Satterwhite was crucial in that it related directly to a specific finding that the Texas jury had to make in order to impose a death sentence. In the instant case, Chatman's testimony did not bear directly on the statutory aggravating circumstance which the state had to prove according to statute.

In addition to the above, Respondent notes that during the cross-examination of Chatman, counsel for Petitioner brought out Chatman's record and pointed out to the jury that some of his prior convictions involved deception. In light of the impeachment evidence against Chatman, and the fact that Chatman's testimony did not bear on a crucial issue at trial, the undisclosed nonpromissory marginal agreement was harmless beyond a reasonable doubt. The trial court found that Chatman's testimony was not material and was harmless beyond a reasonable doubt when it specifically stated in its finding that Chatman's testimony "added nothing to the case." Patillo v. State, at 262. The Supreme Court of Georgia adopted the trial courts finding. Id.

Because Chatman's testimony was not crucial to the state and did not relate to statutory aggravating circumstances, because substantial impeachment evidence was presented at trial, and because the trial court and the Supreme Court of Georgia specifically found that Chatman's testimony added nothing to the case and thus was harmless to the Petitioner, Respondent respectfully asserts that Petitioner's allegation does not present any issue for review by this Court.

CONCLUSION

This Court should refuse to grant the writ of certiorari to the Supreme Court of Georgia as it is manifest that there exists for review by this Court no substantial federal question not previously decided by this Court. Additionally, the decision sought to be reviewed is in accord with applicable and recent decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Eddie Snelling, Jr., a member of the bar of the Supreme Court of the United States and counsel of record for the Respondent hereby certifiy in accordance with the rules of the Supreme Court of the United States that I have this date served a true and correct copy of this brief in opposition for Respondent upon counsel for the Petitioner by depositing a copy of same in the United States Mail with proper address and adequate postage to:

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This _____ day of September, 1988.

EDDIE SNELLING, JR.
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